THE CONSTITUTION AND TERRITORIAL POSSESSIONS.

CONSTITUTIONAL agitation never ceases. The men who in 1787 drafted the great paper constitution made from it in 1789 the vital, working, real Constitution of the United States.

Since the middle of this century there has been a vigorously contested question as to whether the Federal Constitution applies *ex proprio vigore*, or by its own force, to a territory which is not a member of the Federal Union; or, in other words, as to whether the term "United States" in the Constitution includes more than the States united. This same question was decided in the negative in the case of "territory" which had been relinquished by Great Britain, most of which had been made into an organized Territory before the great instrument was formed. Is the question now settled in the affirmative? Does the clause, for example, which enjoins uniform duties, imposts, and excises "throughout the United States" bind Congress as to the "territory" over which that body has jurisdiction? Has the "United States" of the Constitution become in law the same as the United States of popular language?

There was no unsettling of the original interpretation of the Constitution as to territory when the Union first acquired foreign territory. But in 1822, after Florida had been acquired, the question was agitated thoroughly in Congress. The previous solution of the question was not decried, however, for it was proposed only to extend the Constitution by statute to the Territory of Florida—just as Congress might have voted to extend the common law system so as to supplant the civil law system in the Spanish settlements. Before 1850 each attempt thus to extend the Constitution failed. But each attempt was an indisputable recognition of the fact that the Constitution of the fathers had never applied *ex proprio vigore* except to the States. Congress would never have attempted to extend anything which extends itself.

Territory belonging to the United States before our civil war may be classified as under three different conditions. Of the first condition, or status, was all territory relinquished by Great Britain, wherever and whenever it did not form a State or part of a State. Instead of prescribing government for it, the Federal Constitution allowed Congress full power to govern it as that body might deem best—even power to withdraw the ordinance of 1787, if such were desirable—which was extremely different from the over-State, or federal, government so carefully prescribed. Moreover, indisputably, Congress governed that territory in its discretion. Thus the fathers, by written words and by deeds, developed a perfectly elastic, unwritten constitution or system of what they called "territorial government." A reason, if not the only reason, why they never employed the term "colonial government" was the unhappy association which that term brought to them.

Of the second status were the Louisiana, Florida, and Mexican accessions. These were acquired through treaties which promised future Statehood, and that Congress should not govern them as territories entirely in its discretion, as is provided in Article IV., Section 3, of the Constitution. These treaties contained a second kind of governmental recognition of the fact that the general limitations of the Constitution upon Congress did not necessarily apply to territory. To the Territories of Orleans and Florida neither the Constitution nor all of the general statutes were extended while they remained Territories.

Of the third status were the Territories organized during and after 1850, to which the organic acts of Congress promised the Federal Constitution "so far as applicable." These include all the Territories fully organized since 1850, except Washington Territory, and this lack of uniformity was corrected in the Revised Statutes. Thus we have, coming down almost to the present day, a third class of governmental recognitions of the fact that the Federal Constitution

[1] Language as to Utah. Elsewhere it is "not locally inapplicable."

ex proprio vigore applies solely to the Federal Union and the individual States. To such a direct promise of constitutional protection, in respect to the greater part of the territory of the third status, are to be added the implied or indirect promises made by the treaties of cession, as before mentioned. In the case of this territory with double promises of constitutional protection—promises through the two coördinate forms of "supreme law of the land," treaty and statute, which are next in authority to the Constitution itself —it might seem both immoral and illegal to alter such constitutional protection. But Congress has unquestioned legal authority to amend or repeal any of its statutes, and also any law of coördinate authority, as a treaty; and when, in 1882 and 1887, Congress in effect did amend or repeal or ignore this supposed double extension of constitutional protection in the case of Utah, both the Federal Supreme Court and "the common sense of most" recognized it to be not only legal, but also morally justifiable.

Thus a concrete case, involving an unpopular territorial institution, immoral and corrupt, was grasped and mastered by the popular mind in the nation. It is far more difficult, however, to grasp the great legal principles, as principles, by which the court justified such extraordinary power as was exercised by Congress on those two occasions; and perhaps the majority of Americans believe, in our day, that the Constitution of the United States was made for both States and Territories, since the more comprehensive meaning of "United States" is the more often used. Most magazine articles bearing on the question have held more or less vigorously to this side. The Ways and Means Committee recently adopted the less comprehensive meaning, that of States only, by the narrow division of eight to seven—one Republican member of the committee and the Silver member holding with the Democratic minority. And in both houses of Congress a thoroughly organized political party, in these days of party discipline, was not held together upon the question.

There is, of course, a fourth status of Federal territory not a member of the Federal Union. It is found where territory

has been acquired by treaty, but where there has not been promised any constitutional protection for it either by treaty or by act of Congress. Porto Rico and the Philippines are of this status. Instead of being guaranteed any definite "civil rights and political status," these islands and their inhabitants are by the treaty turned over to be governed in the discretion of Congress in clearer words than any in the third section of the fourth article of the Constitution; and even the Dred Scott opinion recognized that the fourth article gave to Congress unlimited discretion in governing the territory relinquished by Great Britain, while it remained territory. Yet, strange to say, many public men, without regard to party affiliations, are to-day claiming that the Constitution, *ez proprio vigore*, applies even to territory of this new class. Why? If for any purpose, it is probably to incline the American people to favor scuttling out of the Philippines or to embarrass the Administration as to an "open door" therein.

One of these men writes, for example, in the *North American Review* for November, 1899, that "an open door to the world's commerce in the Philippines is a political myth," they being an "integral part of the United States." Supporting this side of the question there are at least three leading Supreme Court cases. Upon these stress is often laid; for they seem to strike the nail on the head by making statements to the effect that "United States," in the Constitution, includes States and Territories. They are Loughborough v. Blake (5th Wheaton), Cross et al. v. Harrison (16th Howard), and Dred Scott v. Sandford (19th Howard). In the first case the statement was brought about by the accident of some remarkable arguments of counsel. It was confessedly *obiter dictum*, unlike the similar statements in the two other cases. The opinion in the second case came indirectly from practices, statutes, and words in a treaty of cession, and were the work of that greatest moving force in our constitutional history, the slavery question. The opinion in the third case came directly from that great force.

The first-named case, in 1820, tried the right of Congress to tax the District of Columbia for national purposes. This

was the only question involved, said the court in the beginning of its opinion. The plaintiff's counsel had argued that the clause in the Constitution which grants Congress exclusive legislative authority over the District gives authority to levy taxes for local purposes only. The Court disposed of the argument in part by saying that the right of Congress to tax the District does not depend solely upon that clause. It argued the sufficiency of the clause, but, over and above this sufficiency, the applicability of the first clause in the same section—that giving Congress "power to lay and collect taxes," etc. It was in this argument, which was admittedly superfluous, that the Court uttered the now overworked dictum that the territories were included in the term "United States" in the Constitution.

It is needless to speak of the danger, noted by high judicial authority, of expounding the law by "basing a legal principle upon a dictum;" for later in this Loughborough v. Blake opinion the Court said entirely too much to suit those who base a principle upon the famous dictum. We find words which weaken extremely the *obiter dictum* that "United States" means "the whole American empire." "*If the general language of the Constitution shall be confined to the States*," says the dictum, "still the seventeenth paragraph of the eighth section gives to Congress the power of exercising legislation in all cases whatsoever within the District." Again the Court casts doubt upon its dictum by saying that it is no less necessary to have uniform revenue laws for the territory than it is for the States. Clearly the last is an argument, says Prof. H. P. Judson, not of constitutionality, but of expediency or equity. The Court then thought of the territory as it was in 1820, contiguous to the States, very different from our tropical island territory. Moreover, the famous dictum has been practically overruled or ignored by later decisions of the same Court, even while composed of several of the same justices.

Cross v. Harrison, the second leading case, was decided in 1854. The point to decide was whether the plaintiffs should recover duties paid in 1848–49 to a government *de*

facto at San Francisco, a port of the Mexican accession—duties paid before the collector appointed under Congressional authority had been installed, and before Congress had made it a port of entry, but after the government *de facto* had lost its belligerent right to collect duties. The head of this quasi legal or *de facto* government was also the head or executive of the Federal government, as well as the commander in chief of its army and navy. But the Court did not need or wish to decide that the power of proclaiming whatever law was expedient, while the government *de facto* lasted, was an inherent power in the Federal government as sovereign. There were several reasons for this at that time; and by interpreting the term "United States" as the treaty-making and legislative departments of the government had of their own right done, the Court avoided what it thought to be an unnecessary, if not a dangerous, doctrine of Federal sovereignty, and at the same time it upheld the collection of reasonable and just duties.

Yet such a doctrine of sovereign power would have conformed to the theory and practice of other constitutional nations. Such had been, and is now, the theory on which many things other than tariff matters have been done by our Executive ever since Louisiana was purchased; although Congress at first, superfluously, authorized the President to rule Louisiana in his discretion, as does a dictator, until the Congress organized a government *de jure*. Such is the theory on which the present Executive regulated the tariff in Porto Rico, while he could not regulate the duties on goods brought from Porto Rico to the States or to our territories which have governments *de jure*.

Why did the Court wish to ignore this principle in 1854, and to say that by the ratifications of the treaty California became "a part of the United States?" It continued: "As there is nothing differently stipulated in the treaty with respect to commerce, it became *instantly bound and privileged by the laws which Congress had passed.*[1] The right claimed

[1] In Fleming v. Page (9th Howard) there is a statement by the Court directly to the contrary, and it is sustained by history.

to land foreign goods within the United States, at any place out of a collection district, if allowed, would be a violation of that provision in the Constitution which enjoins that all duties, imports, and excises shall be uniform throughout the United States." The next sentence, however, indicates that the Court was thinking of equity or expediency as well as of law: "Indeed it must be very clear that no such right exists, and that there was nothing *in the condition of California* to exempt importers of foreign goods into it from the payment of the same duties which were chargeable in other ports of the United States."

This was the era in which the party that was usually dominant in all departments of the government earnestly desired new territory, as soon as the sovereignty changed, to be regarded as part of the republic and under the Federal Constitution, which then protected slavery. If it were conceded that acquired territory did not automatically come under the statutes and Constitution of the United States upon the transfer of the sovereignty, what might happen? An abolitionist Congress and President might perhaps get into power, exclude slavery from all the territory, and bring it into the Union as non-slave States. Accordingly, the slavery extension party prepared things for the Mexican accession legally and vitally different from any programme under the Federal Constitution as yet prepared for the Philippines. For years the Calhoun men had tried to get Congress to "extend" the Constitution beyond the States. Now something like today's "integral part" language had crept into the 1848 treaty of cession, and the following winter these men tried to have Congress extend the Constitution to all territory belonging to the United States. "The proposal was rejected in both houses," wrote Senator Benton, "and immediately the crowning dogma is invented that the Constitution goes of itself to the territories without an act of Congress, and executes itself, so far as slavery is concerned, not only without legislative aid, but in defiance of Congress and the people of the territory. This is the last slavery creed of the Calhoun school." [1]

[1] "Thirty Years' View," II., 733.

May the Court legally allow an "open door" to the Philippines, when it thought it could not have allowed it to California? The treaty of 1848 spoke of the Mexican accession as a part of our republic; but the Philippines are spoken of only as the Philippines in the treaty, and are marked off by metes and bounds, recalling to mind the Constitution's expression, "territory or other property." The inhabitants of the former were promised both present civil rights and a future political status; were promised protection in their property, their religion, and in "the free enjoyment of their liberty;" but the "civil rights" of the inhabitants of our new possessions "shall be determined by the Congress," according to the treaty. The treaty of 1848, by the amended wording, promised that the new land—more strictly the "inhabitants"—should be "incorporated in the Union . . . and admitted as soon as possible, according to the principles of the Federal Constitution." But the latter treaty gives not the slightest guarantee as to political status; the "political status of the native inhabitants," and indeed of Spaniards who omit registering their Spanish citizenship, "shall be determined by the Congress." It is our belief, but not our legal guarantee, that Congress will try to deal justly with the Porto Ricans and Filipinos.

There were other points of law and of history in 1854 which, unconsciously and consciously, induced the Court to allow the treaty of 1848 to have its perfect work in both letter and spirit. There was the fact that the Washington authorities had ratified the California tariff regulation soon after the treaty became operative—indeed, they had done so, however, before knowing what that regulation was—by directing the California officials to collect by the Federal schedule. But these officers had previously applied this schedule, on hearing of the exchange of treaty ratifications. All parties were certain of the action of Congress, and had anticipated its action. Indeed, Congress had already recognized the accession—according to the circular instructions issued to the collectors of the customs—before the treaty was completed, as a "part of the Union;" and, as the Court said in

the Dred Scott case and on other occasions, "whatever the political department of the government shall recognize as within the limits of the United States, the judicial department is also bound to recognize and to administer in it the laws of the United States so far as they apply." The Federal law was as desirable in the Mexican accession as in the contiguous new State of Texas, where the Constitution indisputably compelled the law to apply. It was no greater burden to the former than to the latter. It was also expedient, according to a report by the military governor. The application of the law was ordered and executed by the responsible government *de facto*, and was also ordered by the national authorities. Moreover, no treaty provision as to the limits of the United States could be considered objectionable, legally or otherwise, had the Court been constituted able to declare so on other than legal grounds. Neither was the climate too nearly tropical, nor were the inhabitants too numerous to be outnumbered and assimilated by English-speaking immigrants. In fact, such was already the case in California when first the issue was joined.

But in every respect it is wholly otherwise in the Philippines. Especially would our tariff laws for the States, made for both revenue and protection, hinder the development of the Filipinos; and our internal revenue imposts and excises could not well be collected from Filipinos and Porto Ricans. Our Constitution, made for Caucasian States, if extended to the Philippines, would in general hinder more than help their development in civilization and their material prosperity.

The crowning opinion that the Constitution restrains congressional legislation for the territory was delivered in the Dred Scott case, and it was even less a mere dictum than the similar opinion in the previous case. An argument for the plaintiff was that, since the Missouri Compromise act had prohibited slavery in Upper Louisiana Territory, and since the plaintiff had been taken to Fort Snelling therein, therefore the law had emancipated him, and he was consequently thereafter deprived of his freedom illegally. Seven of the

nine justices voted to deny the plaintiff's relief asked. Six of these, according to Associate Justice Wayne's written opinion, declared the Missouri Compromise unconstitutional and void, and this opinion was their ground for denying one of the plaintiff's chief arguments.

The Court held that "territory" acquired beyond the original boundaries of the States and of the "Western lands" could not be governed by Congress "at its own pleasure," "for the erection of forts, magazines, arsenals, dockyards," but that it must be held in trust for statehood and under the protection, from the moment of its acquisition, of the then proslavery Constitution. All the nine justices wrote partial or complete individual opinions, unless we except the chief justice, who wrote the opinion of the Court. The Court's opinion went to the extent of declaring that permanent territories, or colonies, are abhorrent to the Constitution, since the only express authority to bring territory under the flag is the power given to admit new States. The power of the great moving force had so taken possession of the learned chief justice—and indeed every kind of Federal law was already on the side of slavery—that his opinion practically denied the power of Congress to prohibit slavery in, or otherwise to legislate in its discretion for, even lands purchased "for the erection of forts, magazines, arsenals, dockyards," etc., unless such lands were purchased east of the Mississippi and north of Florida. This, if not all of the Court's points, may be found even yet in a strict construction of what the Constitution says. Moreover, as the Court held, the framers doubtless thought only of territory relinquished by Great Britain when they granted to Congress power over "the territory or other property," in the fourth article. They then had enough hard problems without thinking of foreign territory to be acquired. Yet the Court has not at other times contended for so strict a construction of this so-called "property clause" in the fourth article. On the contrary, it has cited it at least a dozen times as the authority, or one authority, of Congress to govern, and to govern in its discretion, territory belonging to the Union.

These three opinions are much quoted by the laity and by politicians. They are seldom, if ever, cited by the Supreme Court, while it is otherwise with its numerous positive decisions on the other side. There are also numerous opinions and dicta involving personal rights, in territory that had the common law or that had been given constitutional rights by act of Congress or by treaty. These, together with the fact that conditions have usually made desirable or expedient a uniformity of tariff and internal revenue laws in territories and States, and the fact that there has been a uniformity with but slight exceptions, have bred an erroneous belief that it is the Consitution which has caused the uniformity of rights and burdens. This is not so. Such uniformity has usually been caused by a number of other reasons: a common race and language, common United States citizenship possessed by most territorial immigrants, the inherited common law, a recognized training of the Territory for equal Statehood privileges, common interests, contiguousness of territory to the States, greater ease of making and executing uniform customs laws, equity, and the spirit of the Constitution and of the nation—these have caused the imposing of the same tariff and internal revenue laws upon Territories as upon States, and these reasons will not exist as to the Philippines.

Congress has made exceptions, however, and these exceptions form a part of the proof of its constitutional power. When it made Hawaii "territory of the United States," at the same time, almost, that it enacted war tariff and internal revenue laws for the States and for other territory under its jurisdiction, it provided that the old Hawaiian laws should remain until it might decree otherwise. Thus, in effect, it recognized the inapplicability of the Cross v. Harrison decision, if not also the proslavery political fallacy which led up to that decision. At another time Congress put not a special tariff, but a special prohibition, upon certain imports for a single one of the Territories (Alaska) which it could not have put upon imports intended for one of the States. The Federal Constitution does not give plenary power as to them, and in all

matters it prevents Congress from discriminating between them.

On another occasion, in 1804, Congress made very low tonnage duties in Louisiana for France and Spain, which together had the bulk of Louisiana trade, and reduced duties on French and Spanish goods. But ships and goods from these two countries paid the same tonnage and import duties "throughout the *United States*" as were paid by ships from other foreign countries. No party and no appreciable number of persons claimed that "throughout the United States" included the port of New Orleans until 1812, when the State of Louisiana was created. Then all men agreed that it was a part of the United States, and that all duties there had to be uniform with those at our Atlantic ports. Moreover, during that period, American ships did not have free entrance at New Orleans; and the Supreme Court did not disturb these laws, which it would have done had that region been legally a part of the United States, and not a mere possession.

Such things indicate that the minority political party of today has strayed far from the interpretation put upon this part of the Constitution by its framers; and the framers knew the meaning of that instrument, if men could know it. That they regarded territory as not under the Federal Constitution is seen again by the fact that they acquired territory in 1803 which was claimed to extend from the mouth of the Mississippi to fifty-four forty and to the Pacific, as an "imperial" colony in all but the name. None of them dreamed that it would soon bloom into States. They thought the bulk of it would not be used even for colonizing for a hundred years. As Mr. Henry Adams shows in his nine-volume history of Jefferson's and Madison's administrations, the prevailing political and judicial opinion through the whole course of Louisiana legislation was strongly to the effect that territorial government is entirely extraconstitutional. Congress ignored even the "bill of rights," or early amendments to the Constitution. It recognized an establishment of a state religion in Louisiana, for example. The clergy were given

salary by the government, as under former sovereignties, contrary to the first amendment, which, as a recent writer on the other side admits, "fixes the bearing of the prohibitions of all the rest."[1] Another writer[2] enumerates part of "a strange medley of Federalists and State Rights men who seemed to agree upon nothing about the Constitution *except that it did not apply to the territories.*"

What has the Supreme Court said, for example, on this side of the question? In 1828, in American Insurance Company v. Canter (1st Peters) the Court, speaking by Chief Justice Marshall, said that "ceded territory becomes a part of the nation to which it is annexed, either on terms stipulated in the treaty of cession or on such as its new master shall impose." How different from his *obiter dictum* of 1820, which many cherish and magnify into a stumbling-block!

In 1840, in United States v. Gratiot (14th Peters), the question was upon the absolute power of Congress in making "rules and regulations respecting the territory or other property;" and the Court said that the power is vested in Congress *without limitation*, and has been considered the foundation upon which the territorial governments rest." In other words, this is the only respect in which they rest upon the Federal Constitution. They have never rested upon the theory of a union of Territories with States. They have never rested on the consent-of-the-governed theory. They have never rested—except from the Dred Scott decision in 1857 to the civil war—upon any other theory than that of the sovereignty of Congress or of its constituents in the States. And since that war the Court has made the principle more and more clear.

In 1850, in Benner v. Porter (9th Howard), the Court said of territorial governments: "They are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law, but are the

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[1] *Yale College Journal*, March, 1900.

[2] In the *Open Court* for February, 1900.

creations exclusively of the Legislative Department and subject to its supervision and control."

In 1872, in Gibson v. Chouteau (13th Wallace), the Court said that "the Constitution vests in Congress the power of . . . making all needful rules and regulations. That power," says the opinion, "is subject to *no limitations*." In 1885, in Murphy v. Ramsey (114th U. S.), the question was upon the right of Congress to pass the Edmunds act, which withdrew the franchise previously held by polygamists. The Court said:

> The people of the United States, as sovereign owners of the national territories, have supreme power over them and their inhabitants. . . . But, in ordaining government for the territories and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress. . . . It rests with Congress to say whether, in a given case, any of the people resident in the territory shall participate in the election of its officers or the making of its laws; and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient.

And in the District of Columbia Congress has withdrawn the franchise from every resident who formerly voted in that territory. Great Britain never exercised or held a theory of more absolute authority over the American colonies or over any of her colonies.

But the decision which more fully adjudicated the disputed power of Congress was Mormon Church (or Romney) v. United States (136th U. S.), in 1890. Congress had in 1887 dissolved this Church as a corporation, and for reasons to its own mind sufficient, and to the minds of its constituents, had through formal proceedings seized the Church property of various kinds, and was holding it subject to the formal order of the Court. It had provided for the distribution of the corporation's property for charitable purposes. In other words, it had in effect *confiscated* a vast amount of Mormon property, and had directed it to be distributed, through legal forms, for the benefit of Mormons and Gentiles alike. A dissenting opinion protested, that "absolute power should never be conceded as belonging under our system of government to any one of its departments." But

the Court said otherwise. It made no new arguments. It seemed to consider none needed, when it had never in history restrained Congress, except by the 1857 decision, and after the civil war that restraint had been removed.[1] It said that "doubtless Congress would be subject to those fundamental principles in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than from any express and direct application of its provisions." It would have been beneath the Court's dignity, and irrelevant besides, for it to ask, "What is the Constitution between friends?" Yet, while those words were but mirthful nonsense when asked, as they were, relative to the Federal Union, to which the Federal Constitution applies by necessity, it would not have been nonsense, apparently, to ask, What is the Federal Constitution when considering territory or territorial inhabitants? The opinion implied that neither political nor personal rights need be allowed in a territory if the expediency and the motive of Congress be sufficient.

Finally, and bearing directly on the legality of an "open door" in a territory, we find the highest court to which a plaintiff may himself appeal such a case under the new regulations made in 1891, the United States Circuit Court of Appeals, saying in 1898 that Congress "may legislate in accordance with the special needs of each locality, and vary its regulations to meet the conditions and circumstances of the people." This case, Endleman v. United States (86th Fed. Rep.), concerned Alaska.

As a matter of fact, *habeas corpus*, bail, jury trial, and the usual legal punishments, have obtained in all the Territories,

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[1] Soon after this Mormon Church decision, in Duncan v. Navassa Phosphate Company (137th U. S.) and Jones v. United States (137th U. S.), the Court distinctly reversed the Dred Scott dictum as to colonies; and it has on many other occasions overridden Judge Taney's major premise, which was that the constitutional power to admit new States is the only authority to acquire foreign territory.

though not from legal compulsion unless it were where treaty, statute, or some obtaining of the common law brought it about. But in another extra-Constitutional jurisdiction jury trial has been disallowed. That is, the United States Consul, or Minister if there be one, in certain pagan countries, under Section 4086 of the Revised Statutes, may disallow it in our consular court jurisdiction, even in capital cases, as was decided *in re* Ross (140th U. S.).

Since the historic proslavery decision was delivered in 1857, therefore, great changes have come. The Court has reversed its attitude. The Federal Constitution has been amended, and a single clause in the thirteenth amendment has alone reversed the two most important points in the Dred Scott decision. First, the practical and general point of Slavery versus Liberty was changed by abolishing slavery "within the United States." Secondly, it abolished slavery within "any place subject to *their* jurisdiction." Although a somewhat recent amendment, it follows the language and spirit of the original Constitution by speaking of the Union of States in the plural number and by regarding a Territory that is not a member of the Union as a possession, not as a part, of the United States. Moreover, Alaska was acquired as a colony, and has been ruled, in all but name, as a colony. Indeed, at the very time that Mr. Justice Taney was proclaiming the impossibility of a United States colony, all of our so-called Territories were then being colonized, and were governed with more absolutism of central government power than was the neighboring British colony of Canada, although he adjudged it wholly unconstitutional to abolish slavery in our acquired possessions, as had been done in Upper Louisiana thirty-seven years before. Moreover, as to the supposed difference between a Territory and a colonial possession, that of expected future participation in the general government, Canada will undoubtedly be voting in the British Parliament long before there are United Senators from Indian Territory and the District of Columbia, or, very probably, from Alaska. Difficulties are often solved by means of names.

Alaska, which was acquired ten years after the Dred Scott decision, has every mark of a colony. Britain's two higher grades of colonies, the self-governing and the semi self-governing, are not to be compared to it. Only India and the crown colonies may be well compared to it, for only these have no representative assembly.[1] It was acquired by treaty, as were all the earlier accessions, excepting Texas. But statehood was not by treaty promised for Alaska. Neither was there any extension of the Constitution promised by the treaty, nor has any been given by Congress, although organized Territories have such an extension promised in their organic acts and in the Revised Statutes. In National Bank v. County of Yankton (101st U. S.) the Supreme Court said that an organic act is a Territory's Constitution; but there has not been as yet any organic act for a Territory in that region. The treaty promised that the few Russians who might remain should from the first be treated as well as the United States citizens who might go thither.[2] But the latter, having proved to be mainly rough explorers and exploiters, said to regard the laws neither of God nor of man, the territory, consequently, has been governed as a partially organized *satrapy*. Its government has been as nondemocratic as that under the British crown colony's governor, or under the Roman proconsul or the old Persian satrap. It has several satraps, instead of one. Yet such government is expedient in Alaska. It is practical; and it is more nearly ideal than the conditions there prevailing.

We have spoken of a treaty stipulation as a "promise." The majority report of the Ways and Means Committee

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[1] The organized territory corresponds to the semi self-governing colony; for in both, in legal theory, their representative bodies can but recommend laws; and a higher authority, on approving, enacts the laws recommended. A State in the Federal Union is the nearest comparison to a self-governing British colony that we have. England, Scotland, and Ireland do not correspond to our States, since they form one "unified state," with one legislative body and one government.

[2] Alaska should be put with territory of our fourth class. In the late Spanish treaty limited constitutional rights were provided for a few Spaniards.

says that such a stipulation has sometimes made an acquisition a "part" of the United States, and sometimes not, as in the case of Porto Rico. A minority report says that treaty stipulations are "not entitled to weight in deciding the question." The one great authority on the point, the Constitution, says that "*all treaties made*, or which shall be made, under the authority of the United States *shall be the supreme law of the land.*"

The Court has never overturned a treaty on constitutional or other grounds, although the political department of the government may overturn or, in effect, modify a treaty after the exchange of ratifications, as well as before. Under certain circumstances, the House of Representatives alone, in its sovereign right and power, may overturn a ratified treaty—as in the case where, for example, the treaty charges the Government with the payment of money. It is only the political or sovereign portion of the Government that overturns treaties and that decides both their constitutionality and limits as to subject matter; in most constitutional countries, indeed, the same is true as to statutes also. The judiciary in those countries interprets and aids in giving effect to the statutes; but the Legislature and Executive decide upon their constitutionality, as upon that of treaties.

Our own courts have often recognized acts as matters "of legislative discretion, not of judicial cognizance." Something more than the courts has had to be trusted in all human government; and in our nation, the sovereign powers which do not remain immediately in the people were placed mediately in the President and Congress, even the power of organizing and reorganizing the Federal Supreme Court. This Court, powerful as it is, does not exercise over certain matters the control that is involved in a power to declare them unconstitutional and void. These are the sovereign matters: Declarations of war, the Executive's war power, treaty making, consular court regulations, territorial government regulations, amending the Constitution, etc. In such an act the sovereign or political part of the Government, or else the whole sovereign people, has full

responsibility and full power. Such an act is always constitutional. The courts can but interpret it, or give effect to it, and they have regularly done so. A treaty stipulation has great weight with them, although often ignored in part by the legislative power.

For the Ways and Means Committee's purpose, the question of the automatic application of the Constitution to Porto Rico was assumed to be a question of the meaning of "throughout the United States," where the Constitution prescribes uniformity of duties. In studying this expression our prime authority and great commentary is the Constitution itself. The terms, "United States," and "Union," are found in it and its Amendments about seventy times. There was one organized Territory, made by the Confederation in July, 1787. The Constitution was not drafted until September. Yet in some instances, "United States," as well as "Union," without controversy or cavil, must mean only the States named individually and so often termed "United States" in the Articles of Confederation, and so termed once in the Declaration, or the composite political entity or commonwealth formed by the State commonwealths united.

Those documents were drafted before men had even thought of a Northwestern or other organized Territory. Therefore, "the United States in Congress assembled," as the Articles so many times word it, could have meant only the thirteen United States. As to whether the new corporation or political entity was meant to contain more than the State corporations or entities which entered into it, is disputed where the context does not determine, as it does determine, for example, where participation in a federal government is involved. But as to the undecided instances, the burden of proof is upon those holding that the meaning of the term is different from the meaning shown in places by the context.

The solution of the great practical question of an "open door" in the Philippines, and of necessary free trade between the States and the new territory after Congress be-

comes responsible for its government, may be regarded as hingeing on the meaning of the expression "throughout the United States," found in the eighth section of the first article. The same expression occurs again in the eighth section in regard to a uniform bankruptcy law. In neither of these cases does the context show the meaning beyond dispute. If, however, this very expression be found again in the Constitution, we must assume that it was intended to mean the same thing as in these two cases; and if the context there shows the meaning unequivocally, then we ought to consider the puzzle solved, if it be a puzzle.

In the next article we have the election of President prescribed, and Congress is empowered to determine the day on which the electors "shall give their votes, which day shall be the same *throughout the United States.*" There is a popular and geographical term "United States," but here we have the context of the Constitution to show that in that instrument the term did not include the Northwest Territory; for in no territory have men ever voted for President, and yet this voting is here prescribed as to "throughout the United States."

On the face of the Constitution there are many things to indicate that its framers intended the term "United States," so far as shall concern the restrictions upon Congressional authority over that political entity, to mean the Federal Union of States. In the preamble, "United States" was indicated as meaning "a more perfect union" of the thirteen States already known by that name; and it was indicated that this proposed new Union, or new United States, was to consist of nine States at the minimum, with no ultimate maximum number indicated. The territorial inhabitants are shown to be not represented in the United States Government; and they are not indicated as coming under the Constitution in matters other than participating in that Government. It is left for Congress to bring them under, so far as the Constitution can be made applicable to territory, if Congress so desires, or to withdraw as much of the Constitution as shall have been applied, if such a course should become

expedient. Congress has done the former in organizing Territories since 1850, and has done the latter partially several times.

The Constitution refers to the territory already transferred by two or three States to the Confederation as "territory belonging to the United States," and gives Congress an extra-Constitutional authority to govern such territory. It shows that it was the States which were to be protected—not at first by the "bill of rights," but protected broadly from a new and much stronger central Government, which it was feared might lead them back to a tyranny as bad as that which they had with such difficulty overthrown. To preserve enough of their State sovereignty, and yet make a federal nation, was the great problem. The Constitutional Convention labored hard upon it throughout a long summer. Even its carefully wrought plan, instead of being quickly ratified, was denounced as a "triple-headed monster," "the gilded trap," "as deep and wicked a conspiracy as ever was invented in the darkest ages against the liberties of a free people." Such conditions account in part for the handing over to Congress so summarily the territory, with its white and other inhabitants. We shall not argue the consistency or the expediency of such variance between a State's privileges and an organized Territory's; we shall but show the fact. If our fathers erred in making it so, it was because they had such absorbing troubles concerning the States, and their success as to the latter should atone for a multitude of errors.

If, then, the Constitution does not necessarily and by its own force protect United States citizens from Congress except in the States, does it at all benefit United States citizens residing abroad or in the Territories? Yes; the people who made or who amend our Constitution have usually seen that it should bind Congress morally, if not legally; and moral force is often more binding in government than is legal force. Up to the present time, the spirit of the Constitution has in some degree extended to all the Territories, unorganized as well as organized. Its letter, too, has extended to the latter

class "so far as applicable." But this has been only by statute, which cannot bind Congress legally; for any statute may be amended or repealed by the body which made it.

The Constitution and Amendments refer to one or more individual States or to the Union more than one hundred and eighty times in demarking and prescribing the whole course of the Federal or over-State Government. But how is it "applicable" *ex proprio vigore* to Territories? Only in these instances, if at all: (1) The granting to Congress of exclusive power over the proposed District for the seat of Federal Government, where at present Congress does not allow the franchise; (2) like authority over lands or places acquired for military or other Federal purposes; (3) the clause as to admitting new States into the Union; (4) that giving Congress power over "territory or other property;" (5) as to forbidding slavery "in any place subject to their jurisdiction;" and (6) empowering Congress to make all laws necessary "for carrying into execution the foregoing powers and all other powers vested."

None of these powers is really prescribed, as the Federal Government is prescribed. It is only that Congress "may" admit new States, and "shall have power to" act in the other five instances, except in that regarding slavery. Therefore not even in the six instances does the Constitution really apply *ex proprio vigore* to territory, but only in the instance that regards slavery; and this is found in an Amendment made nearly a century after the Constitution was drafted. The Congressional powers applicable to territory are practically all powers additional to those of legislating for the Federal States, and form an extra-Federal and extra-Constitutional or "imperial" function. Congress could withhold Constitutional protection from a reconstructing State after the civil war only because of abnormal conditions; but it could at any time have withdrawn the Northwest Territory's Constitution, no matter how it reads, as was partially done with the written constitution or organic act of Utah Territory, and with the Constitution of the District of Columbia. Indeed, the Dred Scott opinion says that the

adoption of the Constitution *ipso facto* withdrew the Ordinance of 1787, and that the first act of Congress amending it was a reënactment. Congress could have governed any Territory with gross injustice, as well as with its absolute authority, were it not for its constituents in the States. But the constituents will not tolerate a theory of absolutism with injustice. Some of them cannot bear to recognize the theory of absolutism at all, even with justice promoted. Yet the framers, who also first interpreted the Constitution, as public men under Washington's administration, together with the highest Court which interprets it, have agreed on the theory of Congressional absolutism over territory.

As to the "territory" which Great Britain relinquished with the acknowledgment of independence, we find unequivocal acts from which we may determine that the framers did not include it under the term "United States" when not within State boundaries. We find this as to the clause in which uniform "duties, imposts, and excises" are enjoined, as well as regarding the remainder of the Constitution. The historians tell us that over twenty thousand white emigrants settled in the Northwest Territory between the granting of the Ordinance Constitution in 1787 and July 31, 1789, when Congress divided the United States into districts for the collection of customs. The Northwest Territory was divided into six collection districts by an act approved March 2, 1798, or almost ten years later; and the first collection of the internal revenues therein was in 1798, several years after the first whisky revenues were collected in the very thinly populated parts of States. Thus for nearly ten years after the Constitution became operative, this now disputed clause had not even an apparent application in an organized Territory. When it was applied, no one is recorded as favoring it on a constitutional ground. No clause was considered applicable to the Northwest Territory except that giving Congress full power over "the territory."

The matter of the political department now deciding more clearly and more formally that, so far as the Constitution is

concerned, uniform duties, imposts, and excises need not prevail in the different territories, and of the judicial department recognizing it as a matter of "legislative discretion," is but the same routine that has been followed in territorial matters not of revenue, in which Congress has used its discretion more conspicuously. The fairest example with which to test the power of Congress to interpret the term "United States" as it wills, so as to legislate for the territories as it wills, is that of the territorial judiciary. Did Congress organize it as the third article of the Constitution prescribes for "the judicial power of the United States?" The first section of that article says that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior."

The leading case in which the subject was discussed is American Insurance Company v. Canter (1st Peters), decided in 1828. The opinion of the Court was written by the same Chief Justice Marshall who, eight years before, had said that "United States" means States and territories. In the new case he said:

> The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts. . . . They are legislative courts, created in virtue of the general right of sovereignty which exists in the government or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress.

How can this be, unless it be that Congress has full power over the territory, and that the term "United States" means United *States* in the Constitution? This was not *obiter dictum*, but it formed a necessary part of the opinion supporting the decision.

In the other cases involving territorial courts, when carried up to the Supreme Court, the Florida case has been followed without a murmur. A summary of several of

these cases is given in the Court's opinion in McAllister v. United States (141st U. S.). This case was decided in 1891. A law had been passed, some years before, authorizing the President in his discretion to suspend, at any time during a recess of the Senate, civil officers appointed by him and confirmed by that body, except *judges of the courts of the United States.* A territorial judge, having been dismissed by the President under this statute before the term of his commission had expired, had sued for prospective salary. The decision hinged upon the question whether the statute's exemption of "judges of the courts of the United States" protected him from such a dismissal. The Court held that neither the letter nor the spirit of the Constitution need enjoin or restrain Congress as to the territory, and that Congress had never made *courts of the United States* for territories.

Congress did not observe the Constitution in the more important matter of territorial courts of justice. Is it the inference that, with but few and limited exceptions, the Constitution compelled observance in a territorial matter of a lower order? Or was it only that Congress usually happened, through motives of equity and expediency, to follow the Constitution regarding territories in that lower matter of internal revenue and tariff? Many things indicate that Congress formed its habit from such latter causes. Indeed, of the great governmental functions—the judicial, legislative, executive, and ministerial—none could have been organized in any territory by following what is prescribed in any Constitution, excepting the organic act, for the simple reason that the Federal Constitution prescribes only a federal government. It leaves territorial government to Congress, as State government to the respective States. It guarantees a republican form of government to each State; but territorial governments are never fully republican, being under an "imperial" or Federal government, in which they have no vote; territorial legislators have never been allowed to legislate inconsistently with the Federal Constitution; and territorial judges and other appointive officials have always been

compelled, inconsistently, to take an oath to support the Constitution—while they are all unprotected by it.

The best illustration of the working of this part of the American unwritten constitution may be found in the case of Utah. It will serve also as a summary of this paper. In many respects the Territories of Orleans, Florida, Alaska, Indian Territory, and the District of Columbia afford better illustrations of the principle. But Utah comes in the class of territory, as made in this essay, in which a treaty had promised constitutional rights for the inhabitants, and Congress unequivocally promised such rights in the organic act which made Utah a Territory. It was of the most guaranteed class of territory that the United States ever possessed. If Congress legally and really used a free hand with it, then surely it may do so with our least guaranteed class, so far as legal power is concerned.

On September 9, 1850, by the multiplex Compromise or Omnibus bill, Congress for the first time decreed that the Federal Constitution should be extended over organized Territories so far as applicable. The Mexican accession was organized into one State and two Territories. The northern Territory was called Utah, although it was then nearly three times as large as the later Utah. Did the Constitution prove to be "applicable?" Was it "extended" so as to be beyond the power of Congress to recall it?

Until admitted into the Union Utah had no vote in amending the Constitution, no voice in treaty-making, no vote in any kind of United States legislation, nor any participation whatever in the national government. She had nothing to claim as of legal right from the Executive Department, which sent thither governors and other appointive officers, usually from the East, to rule her; and she had from the Judicial Department no protection against Congress, although she was privileged by statute to appeal to the former her territorial court decisions.

Her organic law, such as the Supreme Court has in effect said is a Territory's written Constitution, was neither adopted by the people of Utah nor was subject to their amend-

ing. Unlike any State's Constitution, Congress amended it, and could have withdrawn it. It mentioned that Congress might divide the Territory, or might form States or parts of States out of it, without its consent, which is otherwise in case of a State. It did not "guarantee a republican form of government," unlike the Federal Constitution. Much of the time there were other kinds of government as well as republican, and later to the exclusion of it; after the Presidents had for years sent to her the territorial governor, marshal, attorney, secretary, and judges—these together having much of the power of the ancient Persian satrap—whatever republican government remained was made oligarchical in 1882 by disfranchising the great majority, the polygamists; and monarchical government had been allowed to Indian nations within the larger Territory of Utah.

Congress could not have been denied the power of abolishing the elective legislature altogether, and of instituting such an appointive legislative council as some early organized Territories have had. Polygamist citizens of Utah, even though having United States citizenship besides, could not migrate into a State and claim immunity under the Constitution's guarantee of "all the privileges and immunities of citizens in the several States;" yet polygamy was for many years a lawful institution of Utah. Her judges had not the same term of office as those prescribed by the Constitution, nor the same jurisdiction except as to cases where Congress had made the jurisdictions alike, as a coincident. Sessions of the Legislature could not exceed forty days. Every voter in the Territory had to have United States citizenship, which is unnecessary in some States even when a President is voted for. The Legislature acted as to other qualifications of voters, and Congress changed the act. Indeed, its every act had to be submitted to Congress for approval. The organic law limited the power of the Territory in selling any lands and in levying local taxes; and, as to all Federal taxation, no representation goes with it in case of any territory. Moreover, Congress in effect *confiscated* in time of peace a vast corporation property belonging to Utah citizens, although it

distributed the property for their benefit along with the benefit of others. Webster's opinion in 1849, that it would be impossible to make the Federal Constitution the Constitution of territory, proved at last to be true.

Therefore, when to-day some one says that our Spanish accessions are "as much subject to and protected by the Constitution as any territorial acquisitions in our history," it is hardly worth while to dispute it. Such things as the foregoing-mentioned allow us to see that Congress could have ignored the letter and spirit of the Federal Constitution as to anything else in Utah, had it been expedient, before she became a Federal State. But in all the things mentioned, it has been otherwise with California, which by the same act of Congress that made Utah a Territory, with the provision trying to apply to Utah the Federal Constitution, was made into a State. Yet for California there was neither expressed word nor intimation or reference as to the Constitution. Such would have been unnecessary, since to States it applies *ex proprio vigore.*

We have been told that territory must be either "an integral part of the United States," or else it is foreign territory. No such sophistry perplexed the framers of the Constitution, including Hamilton, Madison, and the venerable Franklin. They saw no necessity for making the possession a part of the possessor, in order that it might be a possession. We have too often heard it said that if Congress may do away with—or make special—tariffs and internal revenue laws for the Philippines, it would then have the dangerous legal authority and power, without any practical difficulty in the way, to abolish all tariffs for Alaska and all internal revenue laws for all the Territories. Therefore, perforce, the Constitution forbids! Never did public men beg the question more artlessly. The fathers made the Constitution so, and so interpreted it, and the United States never thought best to amend this feature of it. The dominant party in the forties and fifties wished that it had been drafted so as to blanket the Territory by its own force. But they adopted an

easier method of working their will than that of an amendment.

In general, this lack of applying *ex proprio vigore* to the territory is a source of power, not an imperfection; and the Thirteenth Amendment, in strong language of implication, sanctions the primitive doctrine that "United States" in the Constitution does not mean "the whole American empire." Whether this is the meaning in popular language is not a legal question, and whether the free hand allowed to Congress over territory tends toward worse government or better is a question distinct from that of the plenary authority of the Legislative Department over "territory belonging to the United States."

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